Supreme Court, U.S.
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No. 08-672

In the Supreme Court of the United States

EQUITY IN ATHLETICS, INC., PETITIONER

v.

DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in declining to preliminarily enjoin James Madison University from eliminating certain men's and women's athletic teams.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not published in the *Federal Reporter* but is reprinted in 291 Fed. Appx. 517. The opinion of the district court (Pet. App. 16a-74a) is reported at 504 F. Supp. 2d 88.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2008. The petition for a writ of certiorari was filed on November 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IX of the Education Amendments of 1972 provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from partic-

ipation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). In 1975, following notice and comment, the Department of Health, Education, and Welfare (HEW) issued regulations under Title IX, which were approved by President Ford. 40 Fed. Reg. 24,128 (1975). HEW's regulations, which remain in effect through the Department of Education (DOE),[1] address the issue of sex discrimination in athletics, providing that "[a] recipient [institution] * * * shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the [agency] will consider, among other factors * * * [w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. 106.41(c); see 45 C.F.R. 86.41(c); see also 20 U.S.C. 3505(a).

In 1979, also following notice and comment, HEW issued a Policy Interpretation to provide further guidance and address a large number of complaints alleging sex discrimination in athletics. That Policy Interpretation establishes a three-part test (Three-Part Test), whereby an education institution is in compliance with Title IX if it meets one of three criteria:

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[1] In 1979, HEW's functions under Title IX were transferred to DOE, *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 516 n.4 (1982) (citing 20 U.S.C. 3441(a)(3) (Supp. IV 1980)), when Congress divided HEW into two separate agencies, the Department of Health and Human Services and DOE. See Department of Education Organization Act, Pub. L. No. 96-88, § 101, 93 Stat. 669 (20 U.S.C. 3401 *et seq.*). DOE recodified without substantive change HEW's regulations implementing Title IX. See 34 C.F.R. Pt. 106.

i. "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or"

ii. "[w]here the members of one sex have been and are underrepresented among intercollegiate athletes, * * * the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or"

iii. "[w]here the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, * * * it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program."

Pet. App. 95a-96a; 44 Fed. Reg. 71,418 (1979).

In 1996, DOE issued additional clarification regarding the 1979 Policy Interpretation and its Three-Part Test, emphasizing three points. First, DOE "confirm[ed] that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes." Pet. App. 101a. Second, DOE recognized that its three-part test "does not provide strict numerical formulas or 'cookie cutter' answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best

to comply with the law." *Id.* at 102a. Third, addressing apparent "confusion about the elimination and capping of men's teams in the context of Title IX compliance," *id.* at 106a, DOE explained that "[t]he rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing * * * requires that an institution cap or eliminate participation opportunities for men." *Ibid.* DOE issued further clarifications elaborating upon these points in 2003 and 2005. See *id.* at 129a, 135a.

2. a. Petitioner filed this action in March 2007, naming as defendants the United States, DOE, the Secretary of Education, and the Assistant Secretary of Education for Civil Rights. In an amended complaint filed in June 2007, petitioner added as defendants James Madison University (JMU) and various JMU officials, including its President, Athletic Director, and members of the Board of Visitors. The amended complaint alleged that DOE's Three-Part Test was substantively and procedurally flawed, and on that basis sought injunctive and declaratory relief against the federal defendants. The amended complaint also alleged that JMU had announced in September 2006 a plan to eliminate a number of its intercollegiate athletic teams on July 1, 2007.[2] The amended complaint sought injunctive and declaratory relief against the state defendants to halt those planned cuts. C.A. App. 11-65 (amended complaint).

b. On June 15, 2007, petitioner filed a motion for a preliminary injunction. The motion, which requested relief against only the state defendants, sought to enjoin

[2] The teams in question were men's swimming, track, cross-country and wrestling; men's and women's archery and gymnastics; and women's fencing. See Pet. App. 4a.

JMU's planned elimination of specified athletic teams. The motion argued that the planned cuts were based at least in part on DOE's Three-Part Test, and that the Three-Part Test was legally invalid under the Constitution; Title IX, including its implementing regulations; the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*; and various provisions of state law. See Pet. App. 5a-6a.

On August 21, 2007, the district court denied the preliminary injunction. Pet. App. 16a-74a. The court first noted that "any delay attributable to the plaintiff in initiating a preliminary injunction may be considered when balancing the harm to the plaintiff against the harm to the defendants." *Id.* at 42a. Here, "[m]ore than five months elapsed between the date of the Board of Visitors' decision and the date on which this action was filed, and nearly three months elapsed between the filing of the original complaint and the filing of the motion for preliminary injunction." *Ibid.* The court further observed that, "[d]uring this period of delay, the university took a number of actions that it normally would not have taken, and did not take a number of actions that it normally would have taken, based on the fact that certain athletic programs would no longer exist on July 1, 2007." *Id.* at 43a. For example, "[s]everal coaches have been terminated, competitions have been cancelled, and funds totaling nearly $350,000 from the eliminated programs have been reallocated to other programs for coaching salaries and scholarships." *Ibid.* "Additionally, no further competitions have been scheduled for the eliminated athletic programs, no athlete recruitment has taken place for the eliminated programs, and no efforts

have been made to establish the eligibility of the eliminated programs or their athletes."[3] *Ibid.*

In light of petitioner's delay in filing suit and seeking interim relief, and the actions taken by JMU, the court explained that "a strong showing of likelihood of success" on the merits was required to justify a preliminary injunction. Pet. App. 44a (quoting *Direx Israel, Ltd.* v. *Breakthrough Med. Corp.*, 952 F.2d 802, 818 (4th Cir. 1991)). The court determined that petitioner had demonstrated no such likelihood. The court emphasized that, "[i]n addressing [petitioner's] likelihood of success on the merits, the court must * * * recognize that a number of Circuits have addressed many of the same issues raised by [petitioner]," including "whether the Three-Part Test set forth in the 1979 Policy Interpretation violates Title IX or the applicable regulations * * * and whether the proportionality prong of the Three-Part Test offends constitutional principles of equal protection." *Ibid.* The court recognized that "[e]very court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) or by decreasing athletic opportunities for the overrepresented gender (men in this case)." *Id.* at 44a-45a (quoting *Neal* v. *Board of Trs. of the Cal. State Univs.*, 198 F.3d 763, 769-770 (9th Cir. 1999)). "Likewise," the court continued, "every Circuit [to consider] the constitutionality of the proportionality prong of the Three-Part Test has held that it does not offend constitutional principles of equal protection." *Id.* at 46a. "In light of the existing

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[3] The athletic programs at issue have at this point been abolished, and are no longer in existence.

case law," the court was "unable to conclude that any of [petitioner's] arguments [has] a strong likelihood of success." *Id.* at 53a.

3. The court of appeals affirmed in a unanimous, unpublished decision. Applying the traditional factors for considering whether to grant preliminary injunctive relief, the court determined that, "[u]pon review, the balance of the harms here is not so one-sided that we can say that the district court either abused its discretion or clearly erred in its identification and assessment of the harms." Pet. App. 8a-9a. The court noted that, "[a]bsent an 'imbalance of hardship in favor of the plaintiff, then the probability of success begins to assume real significance, and interim relief . . . require[s] a clear showing of a likelihood of success.'" *Id.* at 9a (quoting *MicroStrategy Inc.* v. *Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001)). The court then observed that "nearly every circuit in the country has rejected challenges similar to [petitioner's] underlying complaint against JMU, i.e., that JMU violated Title IX and the Constitution when it used gender to determine which athletic programs to cut." *Id.* at 13a. Against this backdrop, the court concluded that petitioner had "failed to establish a likelihood of success on its claims," and thus had "failed to establish that the district court abused its discretion * * * in rejecting [the] motion for a preliminary injunction." *Id.* at 13a-14a.

ARGUMENT

Petitioner claims that this Court should grant certiorari to determine (1) whether Title IX precludes suit against school officials under 42 U.S.C. 1983 and *Ex parte Young*, 209 U.S. 123 (1908) (Pet. 12-18); (2) whether the court of appeals applies the proper stan-

dard to a request for a preliminary injunction (Pet. 23-24); and (3) whether the government's approach to intercollegiate athletics under Title IX is substantively and procedurally flawed (Pet. 18-23, 24-38). With respect to each of those claims, the unpublished decision of the court of appeals is correct and is not in conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 12-13) that the court of appeals held that Title IX "preempts" suit against school officials under 42 U.S.C. 1983 and *Ex parte Young*. Pet. 13; see Pet. 17-18 ("Title IX cannot preempt § 1983," and "[e]ven if Title IX preempts § 1983, it does not preempt [petitioner's] challenge to the lawfulness of JMU's and DOE's actions."). That is not true. The court of appeals found that petitioner's claims were likely to fail on the merits. Pet. App. 13a-14a. It did not find that Title IX precludes the use of Section 1983 to bring suit against school officers.

Petitioner's mistaken view hinges on its assertion that "the Fourth Circuit cited *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994), for the proposition that '[i]nsofar as the University actions were taken in an attempt to comply with the requirements of Title IX, plaintiffs' attack on those actions is merely a collateral attack on the statute and regulations and is therefore impermissible.'" Pet. 12 (quoting Pet. App. 13a). In context, that statement has nothing to do with implied preclusion, either in *Kelley* v. *Board of Trs.*, 35 F.3d 265 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995), or in the present case.

In *Kelley*, plaintiffs challenged the University of Illinois's elimination of certain men's athletic teams. 35 F.3d at 267. The Seventh Circuit held that Title IX

is consistent with the Constitution, *id.* at 272, and that the implementing regulation and 1979 Policy Interpretation are consistent with Title IX, *ibid.* That made disposing of the case straightforward. It was "clear that the University considered gender solely to ensure that its actions" were in compliance with Title IX, and thus "plaintiffs' attack on those actions is merely a collateral attack on the statute and regulations and is therefore impermissible." *Ibid.* In other words, plaintiffs' suit was "impermissible" not because it was impliedly precluded by Title IX, but because the university could not be held liable for doing what Title IX validly permits.

The court of appeals applied the same logic here. It cited *Kelley* the first time for the proposition that courts have "rejected Equal Protection claims similar to [petitioner's] constitutional claims against JMU." Pet. App. 11a. Indeed, the court quoted *Kelley*'s language that "[t]o the extent that [petitioner's] argument is that Title IX and the applicable regulation . . . are unconstitutional, it is without merit." *Id.* at 12a (quoting *Kelley*, 35 F.3d at 272). Only later did the court cite *Kelley* again, this time for the proposition that JMU could not be held liable for complying with a valid statutory and regulatory scheme. Neither in its citations of *Kelley* nor elsewhere did the court ever suggest that petitioner's action was impliedly precluded. To the contrary, the court repeatedly said instead that petitioner's action lacked merit. *Id.* at 11a-13a. And because the court of appeals did not address the preclusion question, this Court's recent decision in *Fitzgerald* v. *Barnstable School Committee*, No. 07-1125 (Jan. 21, 2009), is not relevant.

2. Petitioner further contends (Pet. 23-24) that the court of appeals applied the wrong standard to its request for a preliminary injunction. Again, that is not

true. In concluding that the district court's denial of interim relief reflected no abuse of discretion, the court of appeals considered the factors that have traditionally governed the preliminary injunction inquiry: "(1) the likelihood of irreparable harm to the plaintiff if the injunction is denied; (2) the likelihood of harm to the defendant if it is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest." Pet. App. 6a.

Petitioner suggests (Pet. 23) that this Court's recent decision in *Winter* v. *NRDC*, 129 S. Ct. 365 (2008), applied a different test from the court of appeals. This Court reiterated in *Winter*, however, that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374. Nothing in the holding of the court of appeals in this case is inconsistent with that well-settled formulation.

Even assuming that, under *Blackwelder Furniture Co. of Statesville, Inc.* v. *Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), the court of appeals "provides interim relief too easily," Pet. 23, and "is too lenient," Pet. 37, petitioner can hardly be heard to complain: it could not satisfy that allegedly laxer standard. Petitioner thus does an about-face and claims that it faced the "opposite problem," Pet. 23, because the court of appeals improperly considered petitioner's delay in requesting injunctive relief.[4] Petitioner does not point to any decision of

[4] The court of appeals did not find that petitioner was barred from requesting or obtaining a preliminary injunction by any "equitable defenses" like laches. Pet. 24. The court found only that petitioner's delay

this Court or of any court of appeals holding that such delay should not be considered.

To the contrary, several courts of appeals have reached the common-sense conclusion that a plaintiff's "[d]elay in seeking enforcement of [his] rights * * * tends to indicate at least a reduced need for such drastic, speedy action" as a preliminary injunction. *Citibank, N.A.* v. *Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985); see, *e.g.*, *Charlesbank Equity Fund II* v. *Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) ("[D]elay between the institution of an action and the filing of a motion for preliminary injunction, not attributable to intervening events, detracts from the movant's claim of irreparable harm."); *Ty, Inc.* v. *Jones Group, Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) ("Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm if a preliminary injunction is not entered.").

3. Petitioner further contends that the government's approach to intercollegiate athletics under Title IX is substantively and procedurally flawed (Pet. 18-23, 24-38). The district court did not abuse its discretion in deciding that petitioner was likely incorrect on both scores. Even assuming petitioner's claims had some likelihood of success on the merits (which they do not), the district court did not abuse its discretion in finding that the public interest weighed against a preliminary injunction. Moreover, there is no need to review the court of appeals' interlocutory decision at this time.

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in requesting such an injunction was itself a factor relevant to whether petitioner had suffered irreparable harm. Pet. App. 42a-43a.

a. The crux of petitioner's argument is that JMU decided to reduce its roster of intercollegiate athletic teams in reliance on DOE's Three-Part Test—a test that, in petitioner's view, is legally invalid. As petitioner concedes (Pet. 12), however, the courts of appeals that have addressed the issue have unanimously rejected similar attacks on the Three-Part Test. See *Miami Univ. Wrestling Club* v. *Miami Univ.*, 302 F.3d 608 (6th Cir. 2002); *Chalenor* v. *University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Neal* v. *Board of Trs. of the Cal. State Univs.*, 198 F.3d 763 (9th Cir. 1999); *Cohen* v. *Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (*Cohen II*), cert. denied, 520 U.S. 1186 (1997); *Kelley* v. *Board of Trs.*, *supra*; *Roberts* v. *Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), cert. denied, 510 U.S. 1004 (1993); *Williams* v. *School Dist.*, 998 F.2d 168 (3d Cir. 1993), cert. denied, 510 U.S. 1043 (1994); *Cohen* v. *Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (*Cohen I*).

As these courts have explained, "Title IX does not require that a school pour ever-increasing sums into its athletic establishment." *Cohen I*, 991 F.2d at 898 n.15. Rather, "[f]inancially strapped institutions may * * * comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population." *Roberts*, 998 F.2d at 830; see, *e.g.*, *Miami Univ. Wrestling Club*, 302 F.3d at 613 (same). Moreover, "[w]hile the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution." *Kelley*, 35 F.3d at 272; see, *e.g.*, *Neal*, 198 F.3d at 772 (same).

There is no merit to petitioner's position that "the writ should [nevertheless] be granted because the circuits have reached an incorrect 9-0 unanimity on Title IX's Three-Part Test, * * * which only this Court's supervisory power can correct." Pet. 12. The rulings below present no error for this Court to rectify. The courts below properly declined petitioner's invitation to grant interim relief on the basis that every court of appeals to address the underlying questions has properly upheld the DOE policies at issue. See *Chalenor*, 291 F.3d at 1047 n.4 ("[T]he [challenged policy] interpretation has guided [DOE's] enforcement of nondiscrimination in athletics for over two decades, without change from Congress. No court has ever held it to be invalid.").[5]

b. The courts below properly evaluated petitioner's procedural as well as its substantive claims. Petitioner argues (Pet. 21-23) that whatever authority HEW had for interpreting Title IX was not transferred to DOE. This Court has rejected that argument before, see *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 516 n.4 (1982)

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[5] Petitioner's attempted reliance (Pet. 12, 33) on *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738 (2007), is misplaced. *Parents Involved* concerned "racial classifications and the higher degree of scrutiny to which they are subject." Pet. App. 58a-59a. As the district court recognized, "in the realm of collegiate athletics," gender classifications "are simply different from racial classifications." *Id.* at 60a. Thus, "'Congress [has] recognized that addressing discrimination in athletics present[s] a unique set of problems not raised in areas such as employment and academics.' * * * Given the unique problems raised by discrimination in athletic opportunity, it would be inappropriate to import a body of law developed in other contexts." *Boulahanis* v. *Board of Regents*, 198 F.3d 633, 638 n.2 (7th Cir. 1999) (quoting *Kelley*, 35 F.3d at 270), cert. denied, 530 U.S. 1284 (2000).

("HEW's functions under Title IX were transferred in 1979 to the Department of Education"), and with good reason. In 1979, Congress divided HEW into two new agencies: DOE and the Department of Health and Human Services (HHS). See Pet. App. 33a-34a. HEW's Title IX regulations, see 45 C.F.R. 86.41, were subsequently recodified as DOE regulations without substantial change, see 34 C.F.R. 106.41. Moreover, DOE has effectively incorporated the Policy Interpretation as its own. See *Cohen I*, 991 F.2d at 895, 896 n.10; *Horner* v. *Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 273 n.6 (6th Cir. 1994); see also Pet. App. 99a (1996 Clarification); *id.* at 129a (2003 Clarification); *id.* at 135a (2005 Clarification).

Petitioner also argues (Pet. 26-28) that DOE's 1996, 2003, and 2005 Clarifications are invalid because they were not promulgated pursuant to formal notice-and-comment rulemaking. But as the district court recognized, the enforcement policies at issue "are interpretive guidelines that the Department was not obligated to issue in the first place." Pet. App. 64a (quoting *National Wrestling Coaches Ass'n* v. *Department of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004), cert. denied, 545 U.S. 1104 (2005)); see *College Sports Council* v. *Department of Educ.*, 465 F.3d 20 (D.C. Cir. 2006), cert. denied, 128 S. Ct. 129 (2007). Thus, notice and comment rulemaking was not required, because "interpretive guidelines are not subject to the APA's notice and comment procedures." Pet. App. 64a.

Petitioner additionally argues (Pet. 29-31) that the 1979 Policy Interpretation is not actually law, because it was not signed by the President. While Title IX provides that any implementing "rule, regulation, or order" must be approved by the President, 20 U.S.C. 1682, "the

statute does not require Presidential approval each and every time an agency issues interpretive guidelines," Pet. App. 65a. Petitioner's "argument to the contrary has been expressly rejected by other courts." *Ibid.* Before this Court, as before the courts below, petitioner "offers no case directly on point that supports its challenge." *Id.* at 13a; see *ibid.* ("In the end, there are no cases directly supporting [petitioner's] procedural challenges.").

c. Because petitioner's substantive and procedural claims have been rejected by every court to consider them, it has shown no likelihood of success on the merits. The district court therefore did not abuse its discretion in denying petitioner's request for a preliminary injunction. But even were an assessment of the public interest necessary, the court of appeals concluded that "the district court did not clearly err in determining that the public interest favored JMU's ability to chart [its] own course in providing athletic opportunities." Pet. App. 14a (brackets in original; internal quotation marks and citation omitted). That fact-bound conclusion provides no occasion for this Court's review.

d. Finally, even assuming that the district court arguably abused its discretion by declining to grant the preliminary injunction, this Court ordinarily does not review interlocutory decisions of the sort at issue here. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); see generally Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007). Petitioner will be able to seek review of any final judgment entered on its constitutional and statutory claims. Because the athletic teams at issue

already have ceased to exist (due in part to petitioner's delay in bringing suit against JMU and requesting injunctive relief), there is no pressing need for this Court to review the court of appeals' decision. The lack of finality of the judgment below is "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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